Supreme Court, U. S.
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76-1427

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. A-12 (76-1427)

REV. PAUL A. McDANIEL,
Appellant,

v.

SELMA CASH PATY, a Resident of Hamilton County, Tennessee; SHIRLEY HASSLER, as Coordinator of Elections of the State of Tennessee; LYTEL LANDERS, as Chairman of the State Election Commission of Tennessee; RAY BLANTON, as Governor of the State of Tennessee; BROOKS McLEMORE, as Attorney General of the State of Tennessee; JOE C. CARR, as Secretary of State of Tennessee; JAMES HARPSTER, TOMMY POWELL, RICHARD HOLCOMB, JACK SEATON, as Members of the State Election Commission of Tennessee; CHARLES HINSON, Chairman of the Hamilton County Election Commission; CLAUDE CLARK, TOMMIE CARTER, JAMES PENLEY, ALBERT W. SECOR, as Members of the Hamilton County Election Commission; TOM MOORE, JR., as Registrar-at-Large for the Hamilton County Election Commission,
Appellees.

On Appeal from the Supreme Court of Tennessee

BRIEF FOR THE APPELLEES

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On Appeal from the Supreme Court of Tennessee

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the Supreme Court of Tennessee was entered on March 7, 1977, and is reported in 547 S.W.2d 897.

JURISDICTION

The opinion of the Supreme Court of Tennessee, sitting at Knoxville, was entered on March 7, 1977. An order in accordance with the Supreme Court's opinion was entered on March

7, 1977, in the Clerk's Office at Knoxville. A notice of intent to appeal was filed with the Clerk on March 16, 1977. An application for a stay of execution was filed with the Clerk on March 28, 1977, and an Order granting a stay of execution for ninety (90) days pending an appeal to this Court was entered on April 21, 1977. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1257(2) in that the Supreme Court of Tennessee has upheld the validity of a provision of the Constitution of Tennessee that is alleged to be repugnant to the Constitution of the United States.

QUESTIONS PRESENTED

The questions involved in this case are:

I

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Free Exercise of Religion Clause of the First and Fourteenth Amendments of the Constitution of the United States?

II

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Establishment Clause of the First and the Fourteenth Amendments of the Constitution of the United States?

III

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Consistent With the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States?

IV

Is the Call for the Constitutional Convention, Chapter 848, Public Acts of 1976, Including § 4, and the Constitution of Tennessee, Article IX, § 1, Unconstitutionally Vague?

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States

The First Amendment to the Constitution of the United States provides for the free exercise of religion.

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances."

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 for equal protection of the laws.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution of Tennessee

Article II, § 9 of the Constitution of Tennessee provides for the qualifications of members of the Tennessee House of Representatives.

"No person shall be a Representative unless he shall be a citizen of the United States, of the age of twenty-one years, and shall have been a citizen of this State for three years, and a resident in the county he represents one year, immediately preceding the election."

Article IX, § 1 of the Constitution of Tennessee provides for the disqualification of ministers from serving in the Tennessee General Assembly.

"Whereas Ministers of the Gospel are by their profession, dedicated to God and the care of Souls, and ought not to be diverted from the great duties of their functions; therefore, no Ministers of the Gospel, or priest of any denomination whatever, shall be eligible to a seat in either House of the Legislature."

STATUTORY PROVISIONS INVOLVED

Chapter 848 of the Public Acts of 1976 of Tennessee, provides for a Limited Constitutional Convention to convene at Nashville on August 1, 1977. Section 4 of the Act provides for the selection and qualifications of the delegates to the Convention:

"Any citizen of the state who can qualify for membership in the House of Representatives of the General Assembly may become a candidate for delegate to the convention upon filing with the County Election Commission of his county a nominating petition containing not less than twenty-five (25) names of legally qualified voters of his or her representative district. Each district must be represented by a qualified voter of that district. In the case of a candidate from a representative district comprising more than one county, only one qualifying petition need be filed by the candidate, and that in his home county, with a

certified copy thereof filed with the Election Commission of the other counties of his representative district.

"Every person desiring to become a delegate to the convention shall qualify by the filing of qualifying petition or petitions by 12:00 o'clock noon, prevailing time, on Wednesday, September 15, 1976. The names of candidates for the delegates to the convention shall be placed on the official ballot in the same manner as candidates for the General Assembly.

"The returns from the various counties of the state electing delegates to the convention shall be certified to the Secretary of State and canvassed by him and the Governor and the Attorney General in the same manner and form as the returns are required to be certified from the election in which the people vote for and against the calling of the convention, as provided in Section 1, and the Governor shall by proclamation announce the names of those elected as delegates to the convention. Delegates to the convention elected and certified shall receive a certificate of election signed by the Governor and attested by the Secretary of State under the Great Seal of the state."

STATEMENT OF THE CASE

This case is before the Court on appeal for a determination as to whether a minister or priest is qualified to hold a public office having the requirement that he be able to qualify as a member of the House of Representatives of the General Assembly, including the limitations contained in Article IX, Section 1 of the Constitution of Tennessee.

Pursuant to the provisions of Chapter 848, Public Acts of 1976, after the voters in Tennessee approved a call for a Constitutional Convention to be held in 1977, in the August 5, 1976 General Election, the appellant, the Rev. Paul McDaniel, the

appellee, Selma Cash Paty, and two other persons filed qualifying petitions for the office of Delegate to the Convention, and their names appeared on the ballot to represent the 29th House District, a part of Hamilton County, Tennessee.* Alleging that the Rev. McDaniel is a Minister of God, serving as pastor of a Baptist Church at the time and that if he should be elected to serve, he could not constitutionally be seated, and the 29th District would be without an elected delegate, the appellee Paty filed a complaint for a Declaratory Judgment, for a determination that the appellant McDaniel is disqualified from holding the office that he sought by reason of Article IX, Section 1 of the Constitution of Tennessee, in that he is a minister, and sought an injunction restraining the Hamilton County Election Commission from placing his name on the ballot. The appellant McDaniel, in his answer, alleged that he was a qualified candidate for election to the Constitutional Convention referred to in the Complaint, that he is not disqualified as alleged in the Complaint, and that the constitutional limitation in Article IX, Section 1, of the Constitution of Tennessee violates and is repugnant to the provisions of the First and Fourteenth Amendments of the Constitution of the United States and, therefore, cannot control.

After considering the limited testimony presented at a hearing and a Motion to Dismiss the complaint filed by the appellant McDaniel, the Court found that the appellant McDaniel is a minister of the gospel within the meaning of qualifications for delegates to the Convention, and that the qualificational requirements of Section 4, Chapter 848, Public Acts of 1976 are unconstitutional under the Constitution of the United States.

After the Chancellor granted an immediate appeal to the Supreme Court of Tennessee, the appellee Paty appealed to the Supreme Court sitting at Nashville. After a remand back to the Chancery Court because the Attorney General was not made

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* The certified count of the votes for Delegate in the 29th House District shows that the Rev. McDaniel received more votes than the other three candidates.

a party to the suit, or given notice of the challenge to the constitutional provisions of Article IX § 1 of the Constitution of Tennessee, the Chancellor reaffirmed his prior determination that the part of Chapter 848, § 4, Public Acts of 1976, requiring that delegates to the Convention be able to qualify for membership in the House of Representatives of the General Assembly, is unconstitutional under the Constitution of the United States.

After another appeal to the Supreme Court of Tennessee, the Supreme Court held, with one justice dissenting, that there was a compelling State interest involved that insures the separation of church and state, and hence Article IX, § 1, of the Constitution of Tennessee is not violative of the free exercise and establishment clauses of the First Amendment of the Constitution of the United States and the equal protection clause of the Fourteenth Amendment. On March 16, 1977, the appellant filed a notice of appeal to this Court from the final judgment of the Supreme Court of Tennessee.

The appellant applied for a stay of the Tennessee Supreme Court's decree of March 7, 1977, to Mr. Justice Stewart, which was denied March 17, 1977, because no previous application had been made to the Supreme Court of Tennessee. On March 28, 1977, the appellant filed an application for a stay from the Supreme Court of Tennessee which, on April 21, 1977, was granted for a period of 90 days from and after March 16, 1977. On June 20, 1977, the United States Supreme Court noted probable jurisdiction of this case. On June 21, 1977, the appellant filed, in the Supreme Court of Tennessee, an application for a stay pending disposition of this case in the Supreme Court of the United States. On June 28, 1977, the Supreme Court of Tennessee denied the appellant's application for a stay. The appellant then applied for a stay of the Tennessee Supreme Court's decree of March 16, 1977, to Mr. Justice Stewart, which was granted on July 6, 1977.

This case is now on appeal to this Honorable Court.

ARGUMENT

I

The Questions on Which the Decision of This Cause Depends Are So Insubstantial as Not to Need Further Argument.

In *Two Guys From Harrison-Allentown v. McGinley*, 366 U.S. 582 (1961) this Court had under consideration the question of whether a Pennsylvania Sunday Closing Law had as its purpose or had the effect of being religious, and one respecting the establishment of religion, or one unnecessarily infringing upon the First Amendment. In holding that the Sunday Closing Law was not religious, and did not violate the due process and equal protection clauses of the Fourteenth Amendment, this Court said that

> "Having carefully examined the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious. See *McGowan v. State of Maryland*, supra, 366 U.S. at p. 449, 81 S.Ct. at p. 1117. Moreover, for the same reasons stated in *Mc Gowan v. State of Maryland*, supra, 366 U.S. at pages 449-452, 81 S.Ct. at pages 1117-1119, we reject appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion." p. 598.

In *Braunfeld v. Brown*, 366 U.S. 599 (1961), decided by this Court on the same day as *Two Guys From Harrison-Allentown v. McGinley*, supra, involving the same Pennsylvania Sunday Closing Law, this Court had under consideration the question of whether the Sunday Closing Law interfers with the free exercise of the appellant's religion. In discussing this issue this Court pointed out that

> "Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell v. State of Connecticut*, 310 U.S. 296, 303, 60 S.Ct. 900, 903, 84 L.Ed. 1213; *Reynolds v. United States*, 98 U.S. 145, 166, 25 L.Ed. 244. Thus, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.
>
> "However, the freedom to act, even where the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell v. State of Connecticut*, supra, 310 U.S. at pages 303-304, 306, 60 S.Ct. at pages 903-904. As pointed out in *Reynolds v. United States*, supra, 98 U.S. at page 164, legislative power over mere opinion is forbidden, but it may reach people's actions when they are found to be in violation of important social duties, or subersive of good order, even when the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:
>
> > 'Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, *that the legislative powers of government reach actions only, and not opinions*, I contemplate with sov-

ereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*' (Emphasis added.) 8 Works of Thomas Jefferson 113. [Footnote omitted].

• • • • • • •

"Thus, in *Reynolds v. United States,* this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince v. Commonwealth of Massachusetts,* 321 U.S. 158, 64 S.Ct. 438, 88 L.Ed. 645, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

"It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, id., 321 U.S. at page 165, 64 S.Ct. at page 441, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

• • • • • • •

"To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the

exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

"Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 et seq. Consequently it cannot be expected, must less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." pp. 603-7.

This Court then affirmed the decision of the United States District Court for the Eastern District of Pennsylvania, 184 F.Supp. 352 (1959), dismissing the complaint after declaring that there was a sufficient state interest for the state and its people that there should be a uniform day of rest and the closing of all but a few limited types of businesses necessary for

the general public interest. The State of Tennessee likewise has a sufficient interest involved in this matter to exclude ministers from the General Assembly, that being the separation of Church and State.

This Court has recently affirmed the principle that while a person has a right to believe as he wishes, his freedom to act is subject to some reasonable limitations. In the case of *TransWorld Airlines (TWA) Inc. v. Hardison*, — U.S. —, 97 S.Ct. 2264, — L.Ed.2d — (June 16, 1977), a maintenance employee, subject to a seniority system established with a union, was required to work on a Saturday, contrary to the principles of a religion which he had adopted after beginning his work with the airlines, and which prohibited him from working on Saturday. After TWA made two attempts to accommodate the employee, but could not permit a change in his work shifts because of the union contract, the airlines refused to permit the employee to work only four days a week because of its needs for the employee's services on the weekends for the continuous operation of the airlines, and discharged the employee for refusing to work on Saturday. In concluding that TWA was justified in terminating the employee, this Court said that

> "Without a clear and express indication from Congress, we cannot agree with Harrison [the employee] and the EEOC that an agreed-up seniority system must give way when necessary to accommodate religious observances." p. 2274.

It is therefore respectfully submitted that because the grounds on which the decision of this cause depends are so insubstantial as not to need further argument, this Court should affirm the decision of the Supreme Court of Tennessee.

II

The Supreme Court of Tennessee Has Properly and Correctly Found That the Call for the Forthcoming Constitutional Convention, Chapter 848, Public Acts of 1976, Which Includes by Reference Article IX, § 1 of the Constitution of Tennessee, Is Fully Consistent With the Free Exericse of Religion, and Establishment Clauses of the First Amendment and Fourteenth Amendment, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

A. Free Exercise of Religion

The call for the Convention, under Chapter 848, Public Acts of 1976, including Section 4 of the Act, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the free exercise of religion provided for by the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel contends that the call for the Convention, Chapter 848, Section 4, Public Acts of 1976, and the Constitution of Tennessee, Article IX, Section 1, deprive him of the free exercise of his religion insofar as those provisions declare that "ministers of the Gospel and priests of any denomination" are ineligible to serve in either House of the Legislature. A review of the significant free exercise cases, however, reveals that these Tennessee provisions represent no infringement of appellee's right to believe. Moreover, although these provisions represent a minimal infringement of the appellant's right to act, that incidental burden is wholly justified by the governmental interest involved.

In the first place, while the right to believe is absolute, these provisions do not represent any interference with that right. In *Torcaso v. Watkins*, 367 U.S. 488 (1961), this Court invalidated a Maryland provision under which a "declaration of

belief in the existence of God" was required as a qualification for public office. The plaintiff in that case obviously had no recourse but to either lose his job or profess a belief wholly inimical to his own religious tenets.

Because the free exercise clause is predicated on the protection of individual belief and action, it is necessary to show some element of coercion in order to establish a violation thereof. *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1965). Therefore, an enactment is not in violation of an individual's freedom of belief if it places no sanction on a religious belief or opinion, or if it does not force anyone to embrace a religious belief or to say or believe anything in conflict with his religious tenets, *Braunfeld v. Brown*, supra; see also, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Anderson v. Laird*, 466 F.2d 283 (D.C. C.A. 1972), *cert. den.* 409 U.S. 1076 (1972).

Viewed in this light, the Tennessee enactments in no way infringe upon the Rev. McDaniel's freedom to believe. We might assume that the appellant, as a Baptist minister, holds the beliefs and tenets of other Baptists. Nothing in the enactments impose a sanction for holding such beliefs or, as in *Torcaso*, supra, forces the appellant to say or believe anything inimical to his Baptist tenets. The Rev. McDaniel's disqualification is not grounded on his beliefs, but rather on the way he chooses to carry out those beliefs, on his actions. Therefore, the requisite element of coercion is simply not present to establish an infringement on the appellant's freedom to believe.

Admittedly, however, there is some infringement, but indirect, on the appellant's freedom of action. The appellant serves as a minister and his status as such disqualifies him from serving as a delegate to the Constitutional Convention. It is well established, however, that while the freedom to believe is absolute, freedom of action is not. *Cantwell v. State of Connecticut*, 310

U.S. 296 (1940). The State may reject certain religious acts where the conduct poses some substantive threat to public safety, peace or order. *Sherbert v. Verner*, 374 U.S. 398 (1963). See, *Reynolds v. United States*, 98 U.S. 145 (1879); *Braunfeld v. Brown*, supra; *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975), *cert. den.* 422 U.S. 954 (1976). In *Reynolds* and in *Swann*, the burden placed upon the individual was direct and harsh since the enactments in those cases made a religious practice unlawful. Therefore, the State's interest in so doing must be substantial and compelling, and there must be a clear and present danger posed by a continuation of the practice. *Swann*, supra.

A different situation is presented where, as here, the practice itself is not unlawful, but where the law simply regulates a secular activity, and, as applied to an individual, operates so as to make the practice of his religious beliefs more expensive or inconvenient. *Braunfeld*, supra. In *Braunfeld*, the plaintiff, an Orthodox Jew shopkeeper, challenged Pennsylvania's Sunday Closing Laws. Since his religious tenets mandated that he keep his shop closed on Saturdays, Braunfeld claimed that the Sunday closing laws gave him an economic disadvantage as against his competitors and, in effect, penalized the free exercise of his beliefs. This Court, in upholding the statute, found a number of facts as persuasive. In the first place, although the state's original objective in passing the enactment was religiously motivated, the statute, in its current form, had the laudable secular goal of providing a uniform day of rest for all citizens. Secondly, the burden on the plaintiff was only indirect. The effect of the law was merely to inconvenience those members of the Orthodox Jewish faith who felt it necessary to work on Sundays. The enactments made no religious practice unlawful and did not affect all the members of any religious group. In such cases, where the goal is secular and the burden indirect, it would be unfair to require that the state show a compelling interest for the law. Rather the standard is far less rigid.

> "But if the state regulates conduct by enacting a general law within its power the purpose and effect of which is to advance the state's secular goals, the statute is valid despite its indirect burden on religious observance, unless the state may accomplish its purpose by means which do not impose such a burden."
>
> *Braunfeld*, supra, at p. 607

The appellees respectfully submit that following the *Braunfeld* analysis, the Tennessee enactments do not infringe upon the appellant's free exercise of religion or, more specifically, upon his freedom of action. The activity being rejected is a distinctly secular activity—that of serving in the general Assembly or as a delegate to the Constitutional Convention. It is entirely within the power of a state legislature to set the qualifications for its members. *Walker v. Yucht*, 352 F.Supp. 85 (D.C. Dela. 1972). Furthermore, while the original motivation for the enactment may have been religiously motivated—to ensure that ministers are not "diverted from the great duties of their functions,"— the enactment's current purpose and effect are distinctly secular—to ensure the necessary separation between church and state. Inasmuch as that separation is the touchstone of the First Amendment, it is surely a valid secular objective for any legislation, *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

Not only are the objectives of the enactments and the regulated activity both of a secular nature but, as in *Braunfeld*, the burden on the religious practice is indirect. The enactments do not make it unlawful for appellant to serve as a minister, nor do they impose any sanction on that activity. Furthermore, the provisions do not place a burden on all Baptists, or on the members of all religious groups. The burden falls only on those who feel it necessary to become members of the clergy. As to this latter group, the provision merely excludes them from one activity—that of serving on the State Legislature or as a delegate

to the Constitutional Convention. While this may cause inconvenience or result in some sacrifice, it does not bar them from the practice of their religion. Surely, this sacrifice is not great compared with the dangers inherent in the entanglement of church and state.

Finally, as in *Braunfeld*, supra, there are no acceptable alternatives for the State to ensure the continuation of the requisite "wall of separation" between church and state. Ministers and priests are, of necessity and by choice, *agents* of their churches and their congregations. While the layman may feel a duty to abide by the tenents of his religion, the minister or priest has a broader duty also to abide by the dictates of his superiors in the organized hierarchy of his church. This is not to say, of course, that his duty to his church will always be inconsistent with his duties as an elected representative, but it is to suggest that the potential for conflict is far greater with a priest and minister than it is with a layman. We must never forget that many of the original settlers were dissenters who wanted to escape from the tyranny of an organized state religion. The First Amendment, with its concomitant spirit of separation of church and state, was drafted with these people in mind. Certainly, the Tennessee enactments, insofar as they seek to preserve this essential separation, do not deprive the appellant of the free exercise of his religion.

B. The Establishment Clause of the First and Fourteenth Amendments

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Establishment Clause of the First and Fourteenth Amendments of the Constitution of the United States.

The appellant McDaniel further contends that the Tennessee enactments, insofar as they penalize only Christian ministers and priests for assuming leadership roles, is a violation of the Establishment Clause of the First and Fourteenth Amendments to the Constitution of the United States.

The intention of this clause was to "erect a wall of separation between church and state," by insuring that the government did nothing to prefer one religion over another, or to aid or inhibit one religion or all religions. *Everson v. Board of Education*, 330 U.S. 1 (1947). As appellant admits, one facet of this definition is aimed at prohibiting all sectarian bias on the part of the State. This concern has led to the interesting interplay between the Free Exercise Clause and the Establishment Clause. The enactment of affirmative legislation designed to inundate the free exercise rights of one group, may bring a legislature into conflict with the Establishment Clause insofar as the legislation gives to one group a special right or privilege. See, *O'Malley v. Brierley*, 477 F.2d 785 (3d Cir. 1973).

Contrary to the appellant's contention, there is no sectarian bias in favor of Christian ministers and priests in the Tennessee enactments. It can hardly be questioned that for the drafters of the Constitution of Tennessee, in their own limited frame of reference, the phrases "ministers of the Gospel and priests of any denomination" meant what the broader more inclusive term "clergy" means to us. (Webster's *New International Dictionary, 2d ed.* (1952) defines "clergy" as "the priesthood, or body of adepts of any religion"). Obviously, the framers of that enactment attempted a more inclusive class through their addition of the phrase, "priests of any denomination whatsoever." This semantic confusion does not render the enactment incapable of interpretation; nor does it raise entanglement problems. As the appellees point out, clergymen are the subject of numerous statutes relating to their exemption from such things as jury

duty and the draft. Courts have obviously developed a considerable amount of expertise in interpreting such terms as "ministers," "priests," and "clergy." Because the Tennessee enactments apply to all "clergy," they demonstrate no sectarian bias.

A more difficult question is posed by the claim that the enactments might violate the Establishment Clause by favoring or inhibiting all religious. Under the three-pronged test proposed in *School Dist. of Abington Township v. Schempp*, supra, however, there is no "establishment" of religion. In the first place, the enactments represent the distinctly secular legislative purpose of preserving the separation of church and state. While it is arguable that the original purpose may have been more religiously motivated, *Braunfeld v. Brown*, supra, demonstrates that what is controlling is the current purpose.

The primary effect of the legislation is neither the advancement nor inhibition of religion. In limiting the exclusion only to clergymen of any religion, the enactments confer no benefit or detriment to "religion." It is inconceivable how any religious group in Tennessee would be hindered or helped by the mere fact that their clergy could not run for the state legislature. There is no nexus between the two. See: *Walz v. Tax Comm.*, supra. Indeed, the only possible effect of the enactments is that which serves as their objective—the assured separation of church and state.

Finally, the enactments represent no excessive government entanglement with religion. As we pointed out before, because of the substantial case precedent with regard to interpreting such terms as "ministers," "priests," and "clergy," there need not be any entanglement problems involved in determining who comes under the enactment's exclusion. Moreover, there is nothing in the enactments themselves that prohibits anyone from becoming a clergyman, or that dictates to religious groups whom they

should appoint as clergy. Because the enactments fully comply with the *Schempp* test, and because they demonstrate no sectarian bias, they are not in violation of the Establishment Clause.

C. Equal Protection Under the Fourteenth Amendment

The call for the Convention, Chapter 848, Public Acts of 1976, including Section 4, and the Constitution of Tennessee, Article IX, Section 1, are fully consistent with the Equal Protection Clause of the Fourteenth Amendment.

The appellant McDaniel further contends that the Tennessee enactments are in violation of his right to vote and his freedom of association secured by the Fourteenth Amendment. The Tennessee enactments, however, infringe neither upon the appellant's right to vote nor upon his right of political candidacy as that right may be related to his freedom of association.

In the first instance, as in any Equal Protection case, it must be determined whether the Court should apply the rational basis test, or the more rigid strict scrutiny—compelling state interest test. The latter is generally applied only when the challenged state action affects some fundamental right, or where the state's classification is based on a suspect criteria. *Walker v. Yucht*, supra. The Appellees respectfully submit that the rational basis test is the appropriate test to apply in this case, and that applying such a test reveals that there has been no Equal Protection violation.

In support of this contention, it should be noted that there is no fundamental right to hold political office. *Turner v. Fouche*, 396 U.S. 346 (1970). In *Turner*, plaintiffs were denied consideration for appointments to the board of education because they were not freeholders. Since this classification, on the basis of wealth, constituted invidious discrimination the Court, there, never went on to consider the question of which test should be applied.

Where, however, as in the case at bar, there is no fundamental right involved and no invidous discrimination, courts will often consider the impact of the legislation. Since the right of political candidacy is often tied to the rights of voters (which are fundamental), courts will colsely scrutinize that legislation that has a real and appreciable impact on the right of franchise. *Bullock v. Carter*, 405 U.S. 134 (1972). In *Bullock*, the United States Supreme Court strictly scrutinized Texas legislation which set inordinately high registration fees for primary candidates, because, as the Court found, that legislation substantially limited the field of candidates and had a particularly harsh effect on poor voters who were unable to contribute toward the registration fees of their candidates. Viewed in this perspective, *Bullock* "is merely a new application of the general axiom that statutory arrangements colliding with the right to vote in such a way as to burden the voting power of discrete minority groups must be closely scrutinized." *Walker v. Yucht*, supra.

As in *Walker*, which upheld a htree-year residency requirement for certain candidates, there is no substantial impact in the case at bar, nor burden placed on any group of voters. The impact of the candidacy restriction is unrelated to the wealth of the candidate or the wealth of his supporters. Moreover, there is no evidence that any one group of voters would prefer the candicay of a clergyman. Finally, because the restriction agects comparatively so few people, the restriction does not substantially limit voter choice. For these reasons, the rational basis test should be applied to determine the validity of the enactments.

In applying the rational basis test, it must be asked whether the classification has a reasonable basis for the achievement of a legitimate state goal. As has already been indicated, these enactments favored the laudable objective of the separation of church and state. Inasmuch as this is the touchstone of the First Amendment of the Constitution of the United States, it

is obviously a legitimate state interest. Moreover, although it may be incapable of proof, there is no reason to assume that the enactments do not forward this objective. While it does not necessarily follow that a clergyman's duty to his superiors will conflict with his duty to the state, the potential for conflict is clear; there is certainly a sufficient nexus to justify the legislation. Finally, it is urged that the Court should determine its limited role in passing on matters so uniquely within the purview of the Legislature. The Court, in *Walker*, was obviously cognizant of this, in noting,

> "Our role is not that of a 'super-legislature.' Instead, we confine our power, in cases of this kind, to determining whether the state's asserted interests are legitimate and whether the chosen means are related to the achievement of the State's goals. Any change in the Delaware Constitution in this regard should come, if at all, from the people of Delaware." p. 100
>
> *Walker v. Yucht*, supra.

The appellant's contention that he has a right of political candidacy based on the fundamental right of freedom of association, is equally untenable. The principal support for appellant's contention is *Williams v. Rhodes*, 393 U.S. 23 (1968), which dealt with an Illinois statute which made it virtually impossible for candidates from any political party, other than the Republican and Democratic Parties, to get on the ballot. The right of political candidacy found therein was based on the right of individuals to associate for the advancement of political beliefs. Since the Rev. McDaniel's party was not discriminated against as a group, freedom of association is surely not at issue in this case.

D. **Vagueness**

The call for the Convention, Chapter 848, Public Acts of 1976, including §4, is sufficient to let the general public know that ministers, as used in the call and Article IX, §1 of the Constitution of Tennessee, mean those who are ordained according to the usages of some church or associated body for performing the duties of the pastorial office.

As used in Article IX, §1, of the Constitution of Tennessee, it is contemplated that those ministers who, by performing in a professional manner for the needs of the members of their congregation, are the subject of the exclusion from being a member of the General Assembly of Tennessee. The appellant cannot say that he has ever had any doubt that he is a minister, and under the disqualifying provisions of Article IX, §1 of the Constitution of Tennessee, cannot be a member of the General Assembly of the Constitutional Convention, as provided for by Chapter 848, Public Acts of 1976.

If there is any doubt about what a "minister of the Gospel" is, this Honorable Court can and should restate its previous definition of the term "minister." This Court has, on at least two occasions, undertaken to define the term "minister", as used in connection with the Universal Training and Service Act. See e.g., 50 U.S.C.A. Appendix, §451, *et seq*. In the case of *Dickinson v. United States*, 346 U.S. 389, 394-5, 74 S.Ct. 152, 156-7, 98 L.Ed. 132, 137 (1953), this Court held

> "Certainly all members of a religious organization or sect are not entitled to the exemption by reason of their membership, even though in their belief each is a minister. Cf. *Cox v. United States*, 1947, 332 U.S. 442, 68 S.Ct. 115, 92 L.Ed. 59. On the other hand, a legitimate minister cannot be, for the purposes of the Act, unfrocked simply because all the members of his sect base an ex-

> emption claim on the dogma of its faith. That would leave a congregation without a cleric. Each registrant must satisfy the Act's rigid criteria for the exemption. Preaching and teaching the principles of one's sect, if performed part-time or half-time, occasionally or irregularly, are insufficient to bring a registrant under § 6(g). These activities must be regularly performed. They must, as the statute reads, comprise the registrant's 'vocation.' "

See also: *Niznik v. United States*, 184 F.2d 972 (1950).

The Tennessee Courts have, on at least two occasions, defined the term "vocation." In the case of *Frierson v. Ewing*, 32 Tenn. App. 366, 222 S.W.2d 678 (1949) our Court of Appeals held that

> "The word 'vocation' is one in common use and means a calling or occupation or business in which one engages more or less regularly. Whether one is engaged in the real estate business 'as a whole or partial vocation,' we think, is a question of fact to be determined upon all the circumstances appearing." p. 371.

In *Tucker v. Jollay*, 43 Tenn. App. 655, 311 S.W.2d 324 (1957) the same court held that

> "A 'vocation' connotes some kind of employment, business, profession or calling." p. 658.

In view of these common sense provisions of the Constitution of Tennessee, and the definitions of minister and vocation, it is respectfully submitted that there can be no doubt about the meaning of the term "Minister of the Gospel" to an ordinary man, and particularly the appellant, and that the term is not unconstitutionally vague.

SUMMARY

The Attorney General of the State of Tennessee respectfully submits that the questions on which the decision of this cause depend are so insubstantial as not to need further argument. While there is an absolute freedom to believe, the freedom to act can be limited if there is a sufficient state or other interest involved.

In this cause there is no attempt to regulate the practice of religion. The Attorney General contends, however, that if the appellant chooses to retain his office of full time minister of a Baptist Church, the State has a sufficient basis, the separation of church and state, to limit his activities of a secular nature.

No attempt has been made in either the call for the Convention or the disqualification provisions of the Constitution of Tennessee in question, to establish any type of religion in the State of Tennessee. The term "ministers of the Gospel and priests of any denomination" includes the clergy of any and all religions or sects.

There is no denial of the appellant's rights under the equal protection provisions of the Fourteenth Amendment of the Constitution of the United States. There is no fundamental right to be a candidate for or hold any political office.

The term "ministers of the Gospel and priests of any denomination" is sufficiently clear when considered with the other language in the disqualification section of the Constitution of Tennessee in question, to put the public on notice that those ministers who vocation is that of full time ministers are disqualified under the Constitution of Tennessee.

CONCLUSION

Based on the foregoing it is respectfully submitted that the decision of the Supreme Court of Tennessee should be affirmed, because it has properly and correctly found that the call for the Constitutional Convention is fully consistent with the provisions of the First and Fourteenth Amendments of the Constitution of the United States.

Respectfully submitted,

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Certificate of Service

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This 2nd day of September, 1977.

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